



**IRCP**

Institute for International Research on Criminal Policy  
Ghent University

Prof. Dr. G. Vermeulen – Mutual Recognition in Practice: Foreign Evidence – Trier, 29 July 2010

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# Mutual Recognition in Practice: Foreign Evidence

Prof. Dr. Gert Vermeulen

Summer Course on European Criminal Justice  
ERA – Trier, 29 June 2010



## Structure

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- > gathering & using foreign evidence
  - > problems not limited to “foreign” evidence *sensu stricto*
  - > problems not limited to “evidence” only - also: information
  - > difference generic term evidence and evidence before court
- > introduction - state of play
  - > investigation in criminal matters & evidence
- > complications in practice
- > future challenges and perspectives
- > questions & discussion



## Investigation in criminal matters & evidence (1)

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- obtaining existing (available) evidence
  - house search
  - freezing order (with 3rd parties)
  - seizure (often requiring house search)
  - order to provide/allow access to
- obtaining “new” evidence
  - hearing, confrontation, covert investigations, analysis, expertise
- obtaining evidence “in real time”
  - interception telecommunication
  - covert investigations
  - monitoring bank accounts



## Investigation in criminal matters & evidence (2)

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- > traditional legal instruments
  - > [overview](#)
  - > principal rules of play
    - > inter-state cooperation
    - > exequatur or transfer procedure
    - > compatibility with law requested state
    - > dual criminality
- > MR plan
  - > remove obstacles in contexts (house) search/seizure
  - > remove/tackle fiscal or *ordre public* exceptions
  - > recognition of orders freezing evidence

## Investigation in criminal matters & evidence (3)

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- › forthcoming instruments
  - › at international/EU level (to be implemented domestically)
  - › principal rules of play
    - › between locally competent judicial authorities
    - › no more exequatur or transfer procedures
    - › blind recognition – via order+certificate or warrant
    - › dual criminality requirement basically abandoned
    - › refusal for (disguised) fiscal reasons further restricted
- › which EU legal instruments?
  - › 2003 FD European Freezing Order
  - › Protocol 16 October 2001
  - › 2008 FD European Evidence Warrant (EEW)
  - › MR order/warrant for all forms of MLA?
  - › Free movement of evidence?
  - › European Pre-Evidence Warrant?



## 2003 FD European Freezing Order

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- > immediate execution (within 24 hours)
- > of freezing orders, aimed at preventing transfer, destruction, conversion, disposition or movement etc of objects, documents or data which could be produced as evidence in criminal proceedings in the issuing MS
  - > also of alleged proceeds from crime, equivalent goods, instrumentalities + *objectum sceleris*
- > if accompanied by standard certificate
- > no exequatur procedure
- > no dual criminality check for offences
  - > punishable in issuing MS with +3 years
  - > and appearing in the standard list of 32 “warrant” offences
- > freezing maintained until transmission
  - > following a separate request to that end





## Protocol 16 October 2001

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- further reduction (disguised) fiscal exception
  - no banking secrecy exception allowed
  - acquis 1978 “fiscal” protocol to 1959 ECMA integrated
  - 2x without possible recourse to reservations
  - effectiveness dependant on state’s willingness to ratify
- Article 1: information about (existence) bank accounts
  - owned or controlled (as proxy) by (legal) person
- Article 2: information about specific accounts/transactions
- Articles 1-2
  - may be subjected to search/seizure restrictions
  - however: evidence warrant (infra)
- Article 3: ‘monitoring’ bank accounts: bank account tap



## 2008 FD European Evidence Warrant (1)

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- > execution within strict time limits of requests
  - > for transmission of objects, documents and data
  - > for seizure, transfer, house search
- > via uniform European Evidence Warrant
- > no conversion or exequatur procedure
- > no dual criminality check if
  - > no house search is required
  - > offence in 32-list
  - > Germany allowed opt-out
    - > reintroduction dual criminality check for 6/32 offences





## 2008 FD European Evidence Warrant (2)

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- > fast/efficient mechanism for obtaining existing evidence
  - > including accounts/transactions (Articles 1-2 Protocol 2001)
  - > not for new evidence gathering
  - > not for evidence gathering in real time, such as through telecom or bank account tapping
- > access to info on servers on non-EU territory
  - > yes, if lawfully accessible from territory executing MS
  - > = beyond CoE Cybercrime Convention



## Complications in practice

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- > where gathered
  - > in another MS, in a 3rd state, internally?
- > by whom (foreign/own authorities?)
- > context of gathering
  - > primarily internal purposes, following MLA request, in JIT context?
- > status (existing, new, real-time?)
- > type of measures required?
  - > coercive/intrusive/privacy-invading?
- > type of source (administrative, military, criminal justice?)
- > type of purpose of use? (similar as for source)
- > use (information/pre-evidence, evidence)
- > type of authorities involved (police, customs, prosecutor ...)
- > in context of police (LE) or judicial cooperation?



## Future challenges and perspectives

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- > clarification relation between MLA and police cooperation/Europol
  - Principle of Availability (PoA)
- > FD data protection 3rd pillar
- > (future) “mutual recognition (MR)” -based MLA
  - > explanatory memorandum 2003
    - > additional fd’s announced ultimately to be consolidated in a single instrument
    - > that can replace mutual assistance altogether
    - > including 2000 EU-MA/2001 Protocol
  - > mutual recognition evidence
    - > if lawfully collected in locus MS?
- > 2009 Green Paper – 2010 impact assessments
- > 2009-10 IRCP EC study cross-border gathering & use of evidence
- > 2010 draft directive for a European Investigation Order
- > 2010-11 IRCP EC study future framework judicial cooperation



## IRCP 2009-10 study for EC

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  - > Project assumptions
  - > Project methodology
- > Clustering investigative measures
- > MR of investigative measures
  - > 32 MR offences
  - > Enhanced stringency in cooperation
  - > Accepting and executing orders
  - > Horizontalisation of cooperation
- > Free movement of evidence
- > Concluding remarks



# Rapidly changing environment

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- > 2000 – EU MLA Convention (entry into force 2005)
- > 2003 – Freezing order (implementation by 2005)
- > 2004 – Study by British Law Society
- > 2008 – EEW (implementation by 2010)
- > 2009 – Awarding study to IRCP
- > 2009 – Green Paper (obtaining/admissibility)

## Project assumptions

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- > Overcomplexity of the environment
  - > Combination of MR and MLA instruments
  - > Partial coverage of investigative measures
  - > Need for benchmarking framework
- > Feasibility of future MR based MLA
  - > MLA flexibility through “widest possible measure of assistance” => cooperation possible for not explicitly regulated investigative measures
  - > Incompatibility MR and MLA features (e.g. spontaneous information, JIT, ...)
- > Free movement of evidence
  - > Usually not covered by cooperation instruments





# Project methodology

## > **Introduction**

- > Rapidly changing environment
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## > **Project methodology**

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- > Eurojust college decision 17 July 2009
- > Online questionnaire management
  - > General evidence related issues
  - > MR/MLA characteristics
    - > 6 cluster strategy => Recurring patterns
    - > 4 MR characteristics
      - > 32 MR offences
      - > Enhanced stringency
      - > Accepting and executing orders
      - > Horizontalisation of cooperation
  - > Institutional capacity



## Project methodology

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- > Aim: map existing legal framework and assess possible support for of the introduction of MR in current MLA regime
- > Feedback from 10 MS does not negatively impact on representative value of the study
- > Additional input Eurojust College
- > Validation of results at expert group meeting



# Clustering investigative measures

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## Basis for clustering

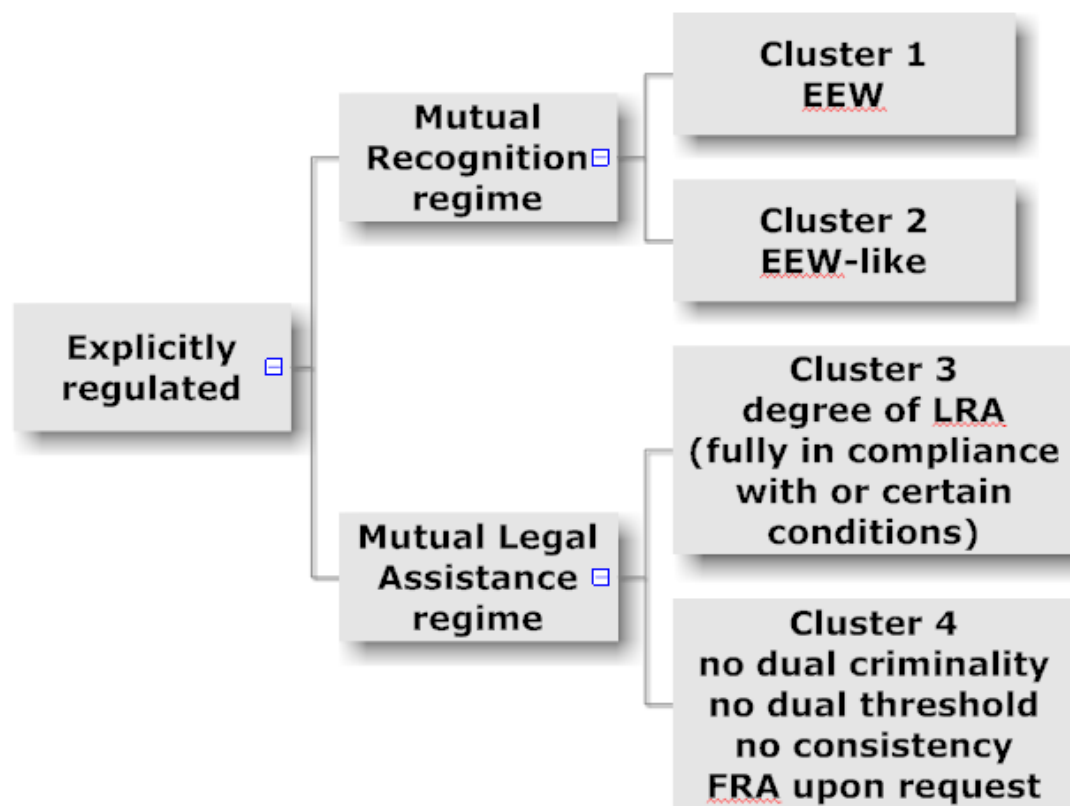
- > MLA flexibility through “widest possible measure” allows cooperation for not explicitly regulated investigative measures
  - > Distinction between explicitly regulated and non regulated investigative measures
  - > Mandatory for any new comprehensive instrument to properly reflect this
- > MR or MLA regime entirely different approach
  - > Distinction according to way of execution

Investigative measures categorised into 6 clusters



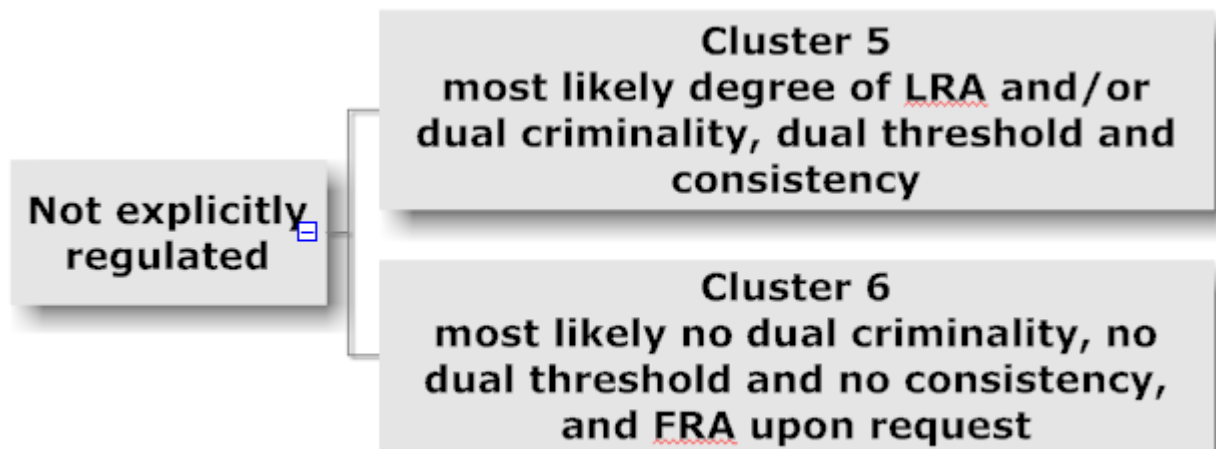
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# Clustering investigative measures

## Cluster 1 EEW

- > Obtaining existing objects, documents or data
- > Including via (house)search or seizure if necessary

“Obtaining objects, documents or data which are already in the possession of the requested /executing authority /member state before a request /order/warrant is issued”

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## Clustering investigative measures

### Cluster 2 EEW-like

- > No valid reason to distinguish between (house)search and seizure for existing or not yet existing objects, documents or data
- > Implicit step forward made by EEW => assumption other forms of (house)search and seizure follow same regime

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**Cluster 3**  
**degree of LRA**  
**(fully in compliance with**  
**or certain conditions)**

- > Execution
  - > In accordance with or in the manner provided for in its national law
  - > Under (certain of) the condition(s) which would have to be observed in a similar national case
- > Examples (from limitative list):
  - > Cross-border observation
  - > Covert investigations
  - > Monitoring bank transactions
  - > Interception telecom (certain types + remote access)



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**Cluster 4**  
**no dual criminality**  
**no dual threshold**  
**no consistency**  
**FRA upon request**

- > Execution may not be made dependent on conditions
- > Examples (from limitative list):
  - > Interception telecom (certain types)
  - > Hearing under oath
  - > Hearing by video conference
  - > Hearing by telephone conference
  - > Transfer of detainees (...)



## Clustering investigative measures

### Cluster 5

**most likely degree of LRA and/or  
dual criminality, dual threshold and  
consistency**

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- > Likelihood of conditions because of intrusive character
- > Examples (from non-limitative list):
  - > Interception of direct communication
  - > Withholding / interception email
  - > Confidence buy
  - > Lie detection test
  - > Extra: trans-border access to computer data



## Clustering investigative measures

### Cluster 6

**most likely no dual criminality, no  
dual threshold and no consistency,  
and FRA upon request**

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- > Likelihood of lenient cooperation because of non-intrusive character
- > Examples (from non-limitative list):
  - > Analysis of existing objects, documents or data
  - > Conducting interviews / take statements
  - > Reconstruction
  - > Video conference hearing of suspects





## MR of investigative measures

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  - > Concluding remarks
- > Principle acceptance
    - > For idea of future MR based MLA regime
    - > For cluster 2 hypothesis
  - > 32 MR offences
    - > Can be either an incentive or an artificial limitation
  - > Enhanced stringency in cooperation
    - > “issuing” and “execution”
    - > Strict reply and execution deadlines
      - > Reply (agree, refuse, ask postponement) 30 days
      - > Executing within 30 day term
      - > Possibility for 45 day extension (postponement)





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- > Grounds for refusal and non-execution
  - > Operational and financial capacity
    - > Operational capacity not accepted as refusal or non-execution ground
    - > Introduce 50/50 share (extraordinary) financial burden (above 10.000 EUR), together with 32 MR offences
  - > Substantive grounds
    - > High importance attributed to *ne bis in idem*: general preservation recommended
    - > Striking support for *immunity from prosecution* considering non-inclusion in existing instrumentarium: need for inclusion



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  - > Concluding remarks
- > Analysis reveals decreasing importance for *double criminality*: support for roll-out for the 32 MR offences
  - > *Impossibility to execute* should not be maintained considering it is EEW-specific and inexistent under current MLA regime
  - > Incomprehensible support for *immunity and privileges*
  - > *(extra)territoriality principle* is EAW inspired and is incompatible with MLA



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- > In spite of empirical results, *essential national security, classified information and ordre public*, should not be maintained (successful reduction in EEW of traditional *ordre public* exception, but unrealistic for broader roll-out)
- > Continued support for traditional *ordre public* justify retention, be it reduced
- > *Political offences* should be abolished as was accepted for extradition and EEW
- > *Fiscal offences*: at least as in EEW



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- > Accepting and executing orders
    - > Accepting validity: Prior domestic decision/order unacceptable restriction on flexibility of MLA
    - > Executing
      - > Compatibility issues
        - > Broad support for FRA (atypical for MR)
        - > Broad support for option to allow persons concerned to claim specific guarantees of a similar national case
        - > Broad support for option to allow persons concerned to claim the best of both worlds
        - > Broad support for option to introduce EU level minima based on/derived from ECHR



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  - > Concluding remarks
- > Consistency issue (scope *ratione materiae/ temporis/ personae / auctoritatis*)
    - > Execution currently limited to 32 MR offences
    - > Recommend further looking into added value 32 MR offences to increase execution surpassing different scopes
  - > Compliance with requested formalities
    - > Not all member states use possibility to request compliance with formalities
    - > Important for admissibility of evidence
    - > High compliance with requested formalities





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- > Horizontalisation of cooperation
  - > Direct communication in stead of central authority
    - > Exception: transfer persons held in custody
    - > Possibility to deviate “in special cases” cannot be maintained any longer
    - > Impacts on importance of institutional capacity
- > Requests in foreign language
  - > Good availability of legislation translated to EN
  - > Good availability of staff and training
  - > Willingness to accept requests/orders in EN
  - > Good availability of proper translation and interpretation services for EN, DE, FR (best for EN)





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- > Technical capacity
  - > Very good availability of proper ICT equipment
  - > Lesser availability of technical means for videoconferencing
  - > Modest availability and quality of technical means for special investigative measures
  - > Low availability and access to travel budget
  - > Very good availability and quality of off-line legal documentation
  - > Very good availability and quality of technical/legal and practical support



## Free movement of evidence

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  - > **Free movement of evidence**
  - > Concluding remarks
- > Admissibility of evidence
  - > Not explicitly dealt with in cooperation instruments
  - > Unlawfully obtained evidence
    - > Comparing regulation in domestic and foreign (existing or obtained upon request) situation
    - > Consequences different: absolute nullity, impact on reliability, importance of fair trial guarantees
    - > Rules rarely constitutionally embedded



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  - > **Free movement of evidence**
  - > Concluding remarks
- > Investigative techniques singled out
    - > Lie detection: reliability issues reflected in high refusal
    - > Provocation: ignorance for prohibition by ECHR
    - > Anonymous witnesses: acceptance in line with ECHR
    - > Hearsay: reluctance to attribute decisive value
  - > Admissibility of foreign evidence
    - > Two specific situations were analysed
      - > information lawfully obtained by a member or seconded member while part of a JIT is accepted (90%) to constitute admissible evidence
      - > Official reports drafted by a foreign authority lawfully present on the territory are accepted to have the same probative value as national official reports



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- > **Free movement of evidence**
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- > Admissibility of foreign evidence
  - > General conclusions
    - > Rarely inadmissible or of reduced probative value
    - > Admissibility abroad reflected in acceptance of domestic admissibility, unless the way the evidence was obtained is contrary to their fundamental principles
    - > Relationship with FRA principle = core question
    - > Clear that introduction of either one/three procedural rights options (supra) would facilitate acceptance



## Concluding remarks (1)

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  - > **Concluding remarks**
- > Comprehensive MR-based MLA instrument?
    - > Yes for comprehensive and some MR characteristics
      - > 32 list + some use beyond traditional use
      - > Reduction grounds for non-execution (# buts!)
      - > Horizontalisation
    - > No for certain MR characteristics
      - > EEW marginally useful as example
      - > No prior effective issuing of decision required
      - > FRA support (opposite to MR execution)
      - > Especially if backed up with one/three procedural guarantees options presented





## Concluding remarks (2)

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  - > Free movement of evidence
  - > **Concluding remarks**
- > Comprehensive MR-based MLA instrument?
    - > No for certain measures
      - > Spontaneous information exchange
      - > JITs
      - > bulk of non-regulated measures
        - > Either keep flexibility of 'widest measure possible'
        - > Or bring cluster 5 & 6 measures under MR
  - > Free movement of evidence?
    - > Per se admissibility unless contrary to fundamental principles *forum state*
    - > JIT-evidence + assimilation value official reports
    - > Keep FRA principle in place (even if atypical for MR)
    - > Introduction of either one/three procedural rights options





## Further challenges

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- > internal coherence judicial cooperation instruments
- > mutual coherence police/LE and judicial cooperation
  - > introduction MR for police/LE
  - > Swedish FD – PoA – pre-evidence warrants
- > intelligence/pre-evidence/evidence
- > future of Eurojust/Eppo – Eurojust



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## Questions & dicussion

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